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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

**FILE: B-205246**

**DATE: April 1, 1982**

**MATTER OF: Northeast Construction Company**

**DIGEST:**

1. Protest asserting that multiple contract awards were improper under the "Additive and Deductive Items" clause of the solicitation is timely filed after bid opening, because it challenges the propriety of the awards rather than the terms of the solicitation.
2. Protest against multiple contract awards under a solicitation containing the "Additive and Deductive Items" clause, which clearly advises that award will be made to the low aggregate bidder, is sustained. Award must be made on the same terms offered to all bidders and multiple awards were improper even though the aggregate award would be more costly to the Government.

Northeast Construction Company (Northeast) protests the award of contracts to Mitchell Construction Company, Inc. (Mitchell), and to Bill Strong Enterprises, Inc. (BSEI), under invitation for bids (IFB) No. F08650-81-B-0174 issued by the Department of the Air Force for rehabilitation of Capehart housing units at Patrick Air Force Base, Florida. The protester essentially contends that, contrary to the terms of the IFB, the Air Force improperly awarded separate contracts for portions of the construction work rather than making award to Northeast on its low aggregate bid.

We find the protest to be meritorious.

The IFB solicits a base bid for replacement of windows (item 0001) and rehabilitation of kitchens and bathrooms (item 0002) in specified housing units and includes five deductive bid items decreasing the number

of units in which rehabilitation work is to be done. Paragraph 10 of the IFB Standard Form (SF) 22, "Instructions to Bidders (Construction Contract)," advises that award will be made to the responsible bidder whose bid is most advantageous to the Government, price and other factors considered, and that the Government may accept any item or combination of items of a bid absent a provision to the contrary in the IFB or a restrictive limitation in the bid. Similarly, paragraph 22 of the IFB, "Additional Instructions to Bidders," states that the Government reserves the right to make award of any or all schedules of any bid, unless the bidder specifically qualifies its bid, and to make award to the bidder whose aggregate bid on any combination of bid schedules is low. The clause further defines the word "item" used in paragraph 10 of SF 22 as "schedule" for the purpose of the IFB. Finally, the IFB includes the "Additive or Deductive Items" clause prescribed in Defense Acquisition Regulation (DAR) § 7-2003.28 (Defense Acquisition Circular (DAC) No. 76-26, December 15, 1980), which provides, in pertinent part, as follows:

"The low bidder for purposes of award shall be the conforming responsible bidder offering the low aggregate amount for the first or base bid item, \* \* \* minus \* \* \* those \* \* \* deductive bid items providing the most features of the work within the funds determined by the Government to be available before bids are opened. \* \* \*"

The Air Force estimates for items Nos. 0001 and 0002 were \$1,308,711 and \$2,054,921, respectively, for a total estimate of \$3,363,632. Of the nine bids received at the bid opening, those of the protester and the awardees were as follows:

<u>Bidder</u>	<u>Item 0001</u>	<u>Item 0002</u>	<u>Total Base Bid</u>
Northeast	\$ 867,000	\$1,431,400	\$2,298,400
BSEI	1,088,504	1,428,400	2,516,904
Mitchell	858,790	1,832,948	2,691,738

The Air Force awarded item 0001 to Mitchell at \$858,790 and item 0002 to BSEI at \$1,428,400--a total cost to the Government of \$2,287,190 (\$11,210 less than Northeast's low aggregate bid of \$2,298,400).

Northeast takes the position that paragraph 22 of the IFB instructions modified any right the Air Force might otherwise have to make multiple contract awards because it defined the term "item," used in SF 22, paragraph 10, as "schedule." The protester asserts that the IFB included only one "schedule," comprised of seven bid items, and argues that the contracting agency therefore could not separately award the bid items of that schedule. Northeast insists that the IFB, which does not include the required clause for evaluation of multiple awards set forth in DAR § 7-2003.23(b) (DAC No. 76-26, December 15, 1980), failed to notify bidders that the Air Force contemplated multiple awards. The protester concludes that the IFB precluded prospective bidders from competing on an equal basis, resulted in awards on a basis other than that stated in the IFB, and compromised the integrity of the competitive bidding system, requiring termination of the contracts and award to Northeast.

The Air Force contends that Northeast's protest to our Office is untimely because it concerns provisions of the solicitation which were apparent, but were not protested prior to bid opening. See 4 C.F.R. § 21.2(b)(1) (1981). In denying Northeast's initial protest to the contracting officer, the Air Force explained that it was not necessary to apply the evaluation method specified in the "Additive or Deductive Items" clause because the low bid for item 0002 did not exceed the available funds. Contrary to the protester's assertions, the contracting agency states that in accordance with paragraph 22, the bid items should be read as, for example, "Schedule 0001" and that the Air Force expressly reserved the right to make separate awards absent qualifications in the bids. The Air Force asserts that the contracting officer correctly determined, pursuant to paragraph 22, that it was in the Government's best interest to make multiple awards at a savings to the Government, citing 47 Comp. Gen. 233 (1967). The Air Force further suggests that multiple contract awards under these circumstances are consistent with DAR § 7-2003.23(b), which provides for evaluation of bids on the basis of advantage to the Government that may result from making more than one award where the individual awards result in the lowest aggregate price to the Government.

We do not agree with the Air Force that Northeast's protest is untimely. Where the protester asserts that it reasonably interpreted an IFB as contemplating an aggregate award and had no reason to believe prior to award that it would be interpreted otherwise, the protester is contending that the IFB precludes award on an item basis, not alleging an apparent solicitation deficiency. Carolina Parachute Company, B-198199, July 30, 1980, 80-2 CPD 79. Timeliness of the protest is determined not by the bid opening date, but from the time the protester knew or should have known the basis of protest. See 4 C.F.R. § 21.2(h)(2) (1981). Therefore, Northeast's protest to the Air Force within 10 working days after notice of the awards is timely, and its subsequent protest to our Office within 10 working days after the contracting agency's denial of its protest at that level will be considered on the merits. 4 C.F.R. § 21.2(a) (1981).

We concur in the protester's assertion that paragraph 34, quoted above in pertinent part, states the controlling basis of bid evaluation and award and that it requires an aggregate award provided such a bid falls within the funds available for the project. In our opinion, items 0001 and 0002 constitute the IFB base bid requirements. The narrative statement preceding the bid items states that the contractor is to perform all work required to rehabilitate the kitchens and bathrooms in 333 housing units and replace awning windows in 999 units. The remaining bid items, collectively listed under the heading "Deductive Bid Items," pertain only to the rehabilitation work specified in item 0002. Award of the greatest deductive bid item would still result in a contract for the rehabilitation of 228 units in addition to the window replacement.

We find that paragraph 10(c) of SF 22, as modified by paragraph 22 of the IFB instructions, merely preserved the contracting agency's right to award schedules, not items, separately. The definition of the term "item" as "schedule" expressly applies only to paragraph 10 of SF 22 rather than to that term as it is used in the rest of the IFB. The fact that the narrative description of the agency's requirement is stated conjunctively, in addition to the failure to include multiple awards as an evaluation factor in the IFB, further indicates that the Air Force did not contemplate making multiple awards at the time the IFB was issued.

The award of a contract pursuant to advertising statutes must be made on the same terms that were offered to all bidders. Because the IFB "Additive and Deductive Items" clause clearly advised bidders that an aggregate award was contemplated, an award made under the IFB must be made to the low aggregate bidder notwithstanding that it will cost the Government more than multiple awards would cost. Com-Tran of Michigan, Inc., B-200845, November 28, 1980, 80-2 CPD 407.

In its report on the protest, the Air Force states that items 0001 and 0002 of the IFB are clearly intended to be severable, that the items are not tied together or related in any way which would require an aggregate award, and that there is no factual necessity for the window replacement and the rehabilitation work to be done by the same contractor. Such statements would ordinarily require the resolicitation of the procurement on a basis that permits multiple awards. Blue Bird Coach Lines, Inc., B-200616, January 28, 1981, 81-1 CPD 51; Com-Tran of Michigan, Inc., supra; B-179253, October 4, 1973. However, in this case, having regard for the fact that all bids have been exposed, that the \$11,210 difference between the aggregate award basis and the item award basis is less than a half of 1 percent of the \$2,298,400 aggregate bid, that resolicitation of the same work on a different award basis would further delay the procurement and create an auction atmosphere, and that award on an aggregate basis would meet the Government's needs as well as an award on a multiple basis, we recommend that the awards to Mitchell and BSEI, be terminated for the convenience of the Government and that an award be made to Northeast, the low aggregate bidder, instead of resoliciting the procurement.

By letter of today, we are advising the Secretary of the Air Force of our recommendation.

This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission

of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

*for* *Whilton J. Dorlan*  
Comptroller General  
of the United States